

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 21, 2009

STATE OF TENNESSEE v. THOMAS ANTHONY PEDIGO

Direct Appeal from the Circuit Court for Maury County
No. 17491 Jim T. Hamilton, Judge

No. M2008-02334-CCA-R3-CD - Filed December 2, 2009

The Defendant, Thomas A. Pedigo, pled guilty to aggravated burglary, a class C felony, and theft of property valued over \$1000, a class D felony. The trial court sentenced the Defendant, a Range III offender, to an effective sentence of fifteen years to be served in the Tennessee Department of Correction. On appeal, the Defendant contends the trial court erred when it sentenced him by not properly applying enhancement and mitigating factors and by not sufficiently articulating its sentencing determinations in the record. Further, he contends that the State did not timely file the mandatory "Notice to Seek Enhancement." After a thorough review of the record and the applicable authorities, we conclude that the trial court did not make adequate findings in the record to facilitate our review. We, therefore, remand this case to the trial court for resentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Larry Samuel Patterson, Jr., Columbia, Tennessee, for the Appellant, Thomas A. Pedigo.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Rachel E. Willis, Assistant Attorney General; Mike Bottoms, District Attorney General; Daniel J. Runde, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

On November 20, 2007, a Maury County grand jury indicted the Defendant for aggravated burglary and theft of property valued over \$1000. The Defendant pled guilty to the

indicted charges, with the trial court to determine his sentence. There is no transcript of the Defendant's guilty plea submission hearing in the appellate record. Consequently, we can only rely on the testimony presented at the Defendant's sentencing hearing and the information contained in his presentence report to summarize the factual background for his case. At the sentencing hearing, the following occurred:

The trial court admitted the presentence report into evidence. That report reflected that the Defendant had nineteen misdemeanor convictions and six felony convictions. Additionally, while on bond in this case, the Defendant was charged with burglarizing a vehicle and theft of property, charges to which he subsequently pled guilty.

The Defendant testified that, at the time of sentencing, he was thirty-two years old and incarcerated. He recalled that on September 6, 2007, he and two other individuals, Mike Allred and Theresa Boyd, broke into a house belonging to the Morales family located in Columbia, Tennessee. The Defendant offered Allred's name to police, and he informed police of the other burglaries in which Allred had been involved. To the Defendant's knowledge, Allred had not been charged with this burglary. The Defendant recalled he showed the authorities where some of the items taken during the burglary were located and police officers recovered those items. The Defendant said Theresa Boyd, who was his girlfriend, was charged with this burglary also.

Describing the reason for this burglary, the Defendant noted he used cocaine at the time of the burglary, and he had used cocaine since he was twenty-five or twenty-six. The Defendant said he spent more than two or three hundred dollars per week on cocaine. The Defendant recalled that Allred approached him with a "way to make some money." The Defendant said he gave Allred a ride to the house they burglarized. After taking some items from the house, they left and picked up Boyd.

The Defendant recalled that he was arrested for this burglary approximately two days after it occurred. He said he did not immediately confess to police, explaining that he was high at the time. Later, when he was sober, he told the police about his involvement and where they could find some of the items taken.

The Defendant said that he had been to jail before for burglaries and auto theft. He never received drug treatment and expressed his need for in-patient drug treatment. He had contacted treatment facilities, one of which agreed to take him as a patient. His mother told him she would pay for his drug treatment.

The Defendant acknowledged that he missed his first sentencing hearing but explained that he was on drugs at the time and not "in his right mind." The Maury Circuit Court issued a warrant for his arrest, and police took him into custody in Coffee County and transported him back to jail in Maury County.

The Defendant apologized to the victim and her husband and asked the court to allow him to get some help for his addiction. The Defendant said he had a tumor behind his right ear and required a breathing machine. When the Defendant was released from jail, he had a job

operating heavy equipment for Civil Construction. The Defendant explained that, while he had been convicted and imprisoned for burglary before, this time was different because he was seeking help for his drug addiction.

On cross-examination, the Defendant testified that he owned a cream colored Buick at the time of this burglary. He said he and his accomplices were going to make three trips when burglarizing the home but ended up making only two trips because Ms. Morales's brother-in-law, Rueben Morales, approached him during the burglary. The Defendant acknowledged that Rueben Morales told police that he saw the Defendant exiting the house. The Defendant denied he entered the Morales house, insisting he only stood by the fence. He agreed that Rueben Morales's statement indicated the Defendant told Rueben Morales that a black man was robbing the house and that the Defendant was trying to stop the robbery. Rueben Morales told the Defendant to stay until the police arrived, but the Defendant drove away.

The Defendant agreed that he had been found guilty of theft of property valued between \$1000 and \$10,000 in September 2002 and October 2001. The Defendant was convicted of aggravated burglary in October of 2001. In May of 2001, the Defendant was convicted of theft of property valued between \$1000 and \$10,000. Also in May of 2001, he was convicted of misdemeanor theft and theft of property valued between \$1000 and \$10,000. He agreed in total, he had been convicted of six prior felonies involving thefts or aggravated burglaries. After serving some time on these previous convictions, the Defendant was released from prison on parole. He, however, returned to prison after testing positive for drugs. Ultimately, he was released from prison June 25, 2007, and then burglarized the Morales's home in September of that same year. The Defendant agreed he failed to appear for his first sentencing hearing in this case because he was using cocaine. The Defendant further conceded that, after he committed the burglary of the Morales's home, he had been charged with burglary of a vehicle and theft of property. While the Defendant agreed he pled guilty to both of those charges a couple of weeks before the sentencing hearing in this case, he denied any culpability for those crimes.

Gladys Lanthans, the Defendant's mother, testified she suspected her son had a problem with drug addiction, and he had told her that he needed help to combat his addiction. She said she spoke with the director of a treatment program the morning of the sentencing hearing, and the director agreed to accept the Defendant into the drug treatment program. Lanthans expressed her concerns over the Defendant's health, noting that he had a tumor behind his ear, high blood pressure, and sleep apnea.

Christine Morales, the victim, testified that in September of 2007 she was in the process of moving with her husband and three children from 106 Canon Road, the house that was burglarized, into a new house. At the time of this burglary, the family was living at the new house but had not moved all their possessions from the Canon Road house. She received word on September 6, 2007, that the Canon Road house had been burglarized and that the perpetrators had gained entry by breaking a solid wood door jam. The burglars also damaged the screen to the front door and jammed something into the doors' locks, which prevented her from properly using her key. Morales identified a list she and her husband prepared of the value of the items taken from her home and agreed that it totaled \$8158. She said her insurance reimbursed her for

all but \$250, which was the amount of her deductible. Morales said that some of the property taken was returned to her, including a small freezer, dolls, collectibles, photographs, and a camcorder, in addition to some other items. Morales expressed her distress at finding the burglars had gone through everything they owned and taken what they considered to be of value, including items that were given to her children by their now deceased grandparents.

Based upon this evidence and arguments of counsel, the trial court found:

The Court has considered the mitigating factors that your attorney has asked the Court to consider. That is, that you helped the police or the law enforcement people locate some of the property that was taken from the Morales' home. And in addition to that, gave some law enforcement people some names of some people who were involved with that aggravated burglary. And you chose to enter a plea of guilty, which did save the state the expense of having a jury trial. I don't put much in that, but that is a factor the court can consider.

On the other side of the rail, the State has filed enhancement factors. That, one, is that you have a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. And you have a conviction, on September the 5th of '02, Class D, theft, in Davidson County, Tennessee, Case Number 200[0]ZB1004. You also have a conviction on May the 21st of 01, in Davidson County, Tennessee, in Case 01B758, for a Class D, theft. You have a conviction on that same date, May 21st of 01, in Davidson County, in Case 2000D2204, of aggravated burglary. On May the 21st of 01, you have a conviction in Davidson County, Case Number 2001A464, Class D, theft. You have a conviction in Davidson County on October the 23rd, of 2001, in Case Number 2001I1019, of aggravated burglary.

You have a conviction in Davidson County, on October the 23rd of '01, in Case Number 2001I1019, Count II, of Class D, theft. And then, you had some prior convictions in Maury County, as well, as those that the Court has listed, with I think makes you a Range 3, offender. And it therefore be the judgment of the Court, that on your plea of guilty to aggravated burglary, it would be the judgment of the Court, pursuant to that plea of guilty, that you be found guilty of aggravated burglary, sentence being 15 years in the Tennessee Department of Corrections [sic].

It would further be the judgment of the Court, that on your plea of guilty to theft over one thousand dollars, that you be[] sentenced to eight years, Department of Corrections, that will be served concurrent with the plea of guilty, with the sentence imposed in the aggravated burglary case.

I will recommend that you be placed either in Special Needs or, as the Attorney General's Office announced, the DuBerry [sic] Center.

It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends the the trial court erred when it sentenced him by not properly applying enhancement and mitigating factors and by not sufficiently articulating its sentencing determinations in the record. Further, he contends that the State did not timely file the mandatory “Notice to Seek Enhancement.” He asks that this Court modify his sentence or remand the case back to the trial court for resentencing.

When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that “the determinations made by the court from which the appeal is taken are correct.” T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm’n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act we may not disturb the sentence even if a different result was preferred. T.C.A. § 40-35-103 (2006); *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the mitigating and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and -114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and (7) any statement the defendant made in the defendant’s own behalf about sentencing. See T.C.A. § 40-35-210 (2009); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). We must also consider the potential or lack of potential for rehabilitation or treatment of the defendant in determining the sentence alternative or length of a term to be imposed. T.C.A. § 40-35-103 (2009). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See *State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001).

In the case under submission, the trial court stated that it considered the mitigating circumstances presented by the Defendant’s counsel but did not identify what if any of those mitigating factors applied. Further, the State sought the application of several enhancement

factors, only one of which was discussed by the trial court. Finally, the trial court made no finding about the method by which the mitigating and enhancement factors had been evaluated and balanced to determine the Defendant's sentence. Thus, the record does not indicate that the trial court properly considered all relevant sentencing principles. We have, in some instances, conducted a de novo review of the Defendant's sentence in similar circumstances. *See State v. Mark Dewayne Culbertson*, E2006-01572-CCA-R3-CD, 2008 WL 65327, at *13 (Tenn. Crim. App., at Knoxville, Jan. 7, 2008), *no Tenn. R. App. P. 11 application filed*. We deem such review not prudent in this case. The Defendant's criminal history is extensive and may very well be sufficient to justify the trial court's imposition of the maximum sentence. *See* T.C.A. § 40-35-114(1). There was, however, evidence of mitigating circumstances. We are not in a position to judge the Defendant's credibility in providing information to law enforcement or his sincerity in that regard. This is simply a case better left for the trial judge to evaluate. Therefore, we remand this case for resentencing with instructions that the trial court identify in the record the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. *See State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001).

Because we are remanding the case for resentencing, we will refrain from deciding the other issues presented by the Defendant.

III. Conclusion

After a thorough review of the record and applicable authorities, we remand this case to the trial court for resentencing.

ROBERT W. WEDEMEYER, JUDGE